



DELBERT HOSEMANN
Secretary of State

**2009 Business Reform Study Groups
Minutes of the Uniform Commercial Code and
Debtor-Creditor Laws Study Group, Meeting #1
June 25, 2009**

This meeting of the Uniform Commercial Code and Debtor-Creditor Laws Study Group (the "UCC Study Group") was called to order on Thursday, June 25, 2009 at 11:00 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi. A list of the persons in attendance is attached at Exhibit A.

Introduction and Opening Remarks

Cheryn Baker, Assistant Secretary of State for the Secretary of State's Policy and Research Division, welcomed those attending and explained that the materials for the meetings and minutes would be posted to the website and a recording of the meeting would be available. Then she discussed the five other study groups assembled by the Secretary of State for 2009: the Trust Laws Study Group, the Model Registered Agents Act Study Group, Limited Liability Company Laws Study Group, Trade Name Registration Study Group, and a task force appointed by the legislature to make recommendations concerning uniformity in real estate recordings.

Next, Secretary Hosemann described the Policy and Research Division, formed in 2008 to develop legislation and policy proposals related to the Secretary of State's jurisdiction. Secretary Hosemann explained that the goal of the UCC Study Group is to bring Mississippi's Uniform Commercial Code (the "UCC") to the forefront of the business world. Therefore, study groups like these are invaluable in achieving the ultimate goal of getting pro-business legislation passed.

Remarks by Co-Chairman Jerome Hafter and Discussion of the Issues

Uniform Commercial Code Issues

Articles 3 and 4 Amendments. First, Chairman Hafter discussed recent amendments to the official text of Articles 3 and 4. He expressed his belief that these amendments were relatively noncontroversial and should probably be adopted, but that the study group should understand them before any decisions are made. Mr. Hafter informed the group that about half of the states have adopted the amendments to Articles 3 and 4.

Revised Article 1. Next, Mr. Hafter noted that Mississippi had not kept abreast of the changes to Article 1, and that it would probably be a good idea to make Mississippi's Article 1 more consistent with that of most of the other states in the country. Again, he cautioned that the group should understand the revisions and their purposes before recommending their adoption.

Revised Article 2 & 2A. Mr. Hafter discussed revised Articles 2 and 2A, which he described as much more controversial than the changes to Articles 1, 3 and 4. Hafter noted the changes to Article 2 were originally intended to be much broader, but eventually were narrowed down to a modernization of existing Articles 2 and 2A. He further noted that no other states have adopted them, and posed the question to the group as to whether Mississippi should be the first to adopt revised Article 2, or whether there were certain parts of these amendments that Mississippi should adopt. Mr. Hafter mentioned a Texas Tech Law Journal Article, which was included in the materials, that examined how revised Articles 2 and 2A would impact current Texas law. He commented that the study was similar to what the UCC Study Group has been tasked with, and that the study might be helpful. The results of the study were mixed, and Texas has not adopted Revised Articles 2 and 2A, Mr. Hafter noted.

Implied Warranty Disclaimers. Mr. Hafter also presented the issue of the implied warranty disclaimer prohibition in Mississippi as a sub-project within Article 2. He illustrated the difficulty the prohibition has presented to businesses by relating to the committee a personal account of a case he worked on in which his client was exposed to consequential damages as a result of a Mississippi judge's unwillingness to apply a choice-of-law provision in the client's contract. Mr. Hafter commented that two years after that case the Mississippi legislature passed several laws prohibiting the law of other states from governing implied warranty disputes, and prohibiting limitations on remedies resulting from the breach of implied warranties. He left the issue on the table as to whether it would be a good idea to change the laws to permit warranties to be disclaimed in non-personal-injury situations.

Article 9 - Clarifying the "Commercially Reasonable" Standard and Use of Debtors' Nicknames on Financing Statements. Next, Mr. Hafter explained that the American Law Institute had formed a consulting group to study several issues with respect to Article 9, but that the report and any amendments were probably still several years out.

"Commercially Reasonable" Standard. Ms. Baker asked Co-Chairman Rod Clement to discuss several suggestions of his with the group. Mr. Clement first discussed the "commercially reasonable" standard under Article 9 as that term pertains to foreclosure proceedings. He noted that Mississippi currently offers some guidance to creditors in the form of a ten (10) day notice requirement for any foreclosure sale, but suggested that Mississippi might offer more guidance to creditors. He proposed that the group should look to see what other states have done with respect to this issue.

Debtor's Name on Financing Statement. Mr. Clement also discussed the issue of debtor's names on UCC Financing Statements in light of a recent Fifth Circuit decision, *People's Bank v. Bryant Cattle Co.*,¹ decided under Mississippi law, which held that a name other than the debtor's legal name was sufficient for a financing statement. Mr. Clement expressed his belief that the decision to

¹ 504 F.3d 549 (5th Cir. 2007).

allow nicknames without a legal name of the debtor was not a good one, and one that might warrant clarification of the law. He observed that the National Conference of Commissioners on Uniform State Laws (NCCUSL) was looking at the issue of debtor's names for the Article 9 amendments, but that the process is slow, and Mississippi might want to consider doing something sooner rather than later.

Mr. Clement next discussed whether to change Article 2 to codify the holding in *Feliciana Bank & Trust v. Manuel & Sessions, LLC*,² which held that a deed of trust interest in timber could not be destroyed by cutting the timber and converting it to personal, as opposed to real, property. He indicated the obvious problem that can be presented for creditors whose security interests are at risk in that scenario.

Statutes of Limitations for Negotiable and Non-negotiable Notes. Mr. Clement stated that currently, Article 3 has a six (6) year statute of limitations on negotiable notes, and under general state law the statute of limitations on non-negotiable notes is three (3) years. He gave an illustration of the problem that arises where a creditor does not know whether the note underlying a deed of trust is negotiable or non-negotiable, and thus whether the statute of limitations is six (6) years or three (3) years on the note.

Co-Chairman Hafter offered a possible explanation for the difference in the statutes of limitations, explaining that when Mississippi adopted Article 3, the uniform version had a four (4) year statute of limitations, and the legislature increased it to six (6) years to conform it to what was, back then, a general statute of limitations in Mississippi of six (6) years. He suggested that perhaps in lowering the general statute of limitations the legislature merely neglected to carry the shortened statute of limitations down through Articles 2 and 3.

Debtor/Creditor Issues

Insolvency Workouts for Small Business Debtors and Subcontractor Liens. Assistant Secretary Baker broached the issues of subcontractor liens and insolvency workouts for small business debtors outside of the bankruptcy laws. She opened the floor for comments on the debtor/creditor issues.

A brief discussion ensued concerning the rising cost of bankruptcy and the need to make it more affordable for small business debtors. Secretary Hosemann mentioned that Texas has a law designed to help small business debtors that has worked well in that state.

One of the attendees commented on the subcontractor lien issue, noting bankers' concerns about the proposal to allow subcontractor liens. He informed the group that he had been working with others on this issue for years, and while the bankers are generally opposed to subcontractor liens, they are open to, and in fact have suggested, other protective measures such as penalties for those parties who cause problems. The attendee mentioned several trade associations that have expressed concerns over allowing subcontractor liens.

² 943 So. 2d 736 (Miss. Ct. App. 2006).

Mr. Hafter then brought it to the group's attention that there is a judicial doctrine that protects subcontractors by putting a responsibility on a lender to ensure that money is properly disbursed – a doctrine which he expressed concern about, since it is amorphous and onerous on out-of-state lenders. Mr. Hafter also briefly mentioned the fact that Mississippi has among the lowest number of bonded construction jobs out of all the states.

Proposed Sub-groups

Mr. Hafter suggested that the group consider dividing into four subcommittees to tackle all of the issues on the table. One sub-group will address the changes to Articles 3 and 4 and the Article 9 issues; another will address debtor/creditor issues, including the issue of small business debtor insolvency workouts; another will address subcontractor liens; and one will address Articles 2 and 2A issues, including whether to adopt the amendments and whether to repeal the prohibition on exclusion of limitations of implied warranties.

Whether to Adopt Article 1 Definitions and General Provisions

Ms. Baker conducted a PowerPoint presentation on 2003 Revised Article 1, noting that thirty six (36) states have adopted the amendments, and three (3) states introduced legislation this past legislative session. She briefed the group on the major changes and discussed reasons why Mississippi should adopt them.

After Ms. Baker concluded her presentation, Mr. Hafter discussed at length the choice of law provision, Section 1-105 of the UCC. He explained that Mississippi had adopted a non-uniform version of Section 1-105 in order to close the “back door” for parties attempting to contract around Mississippi's implied warranty prohibition and limitation on remedies. Mr. Hafter related to the group a personal account of just how burdensome the current choice of law provision in Section 1-105 is for manufacturers, both in Mississippi and out-of-state. There was a general discussion led by Secretary Hosemann concerning the fact that businesses prefer continuity and certainty, and that the non-conforming Article 1 provisions in Mississippi are a hurdle to businesses trying to grow and operate in this state.

At the end of the discussion, Mr. Hafter asked the attendees whether anyone felt there were any other controversial changes in Article 1 that would pose an obstacle to adoption, aside from the choice-of-law and implied-warranty issues. Attendees were generally in agreement that there were no other impediments, and that a decision could probably be reached as to adoption at the next meeting after the members have had a chance to review the materials provided.

Concluding Remarks

Ms. Baker notified the attendees that she would be sending out emails to ascertain interest in the subcommittees, and to inform attendees of future meeting dates and agendas.

One of the attendees took a moment to remind the group to remember the economic environment that the state, and the nation as a whole, is currently operating in. Specifically, he wanted

to bring attention to the fact that banks are currently heavily burdened, and that this burden will increase as new regulations are placed on banks in the near future. Therefore, the member said, the group should try to avoid placing unnecessary burdens on the banks when considering new laws.

Co-chairman Rod Clement proposed that he would draft a short memo on the Article 9 foreclosure and debtor's names issues.

Ms. Baker informed the group that William Henning from the University of Alabama Law School, and a member of NCCUSL, would be speaking at the next meeting concerning the UCC amendments.

There being no further business, Secretary Hosemann thanked the attendees for coming and the meeting was adjourned at 1:00 P.M.

Respectfully Submitted,



Cheryn Baker
Assistant Secretary of State
Policy and Research

Exhibit A
to the June 25, 2009 Minutes of Uniform Commercial Code and Debtor-Creditor Laws Study
Group, Meeting #1

In Attendance:

1. Rod Clement, Co-Chairman
2. Jerome Hafter, Co-Chairman
3. Ed Lawler, Co-Chairman
4. John Thomas Ash
5. Paul Carruba
6. Owen P. Lalor
7. Jason Dean
8. Mac Deaver
9. Jerry Johnson
10. Matthew McLaughlin
11. Caryn Quilter
12. Terre Vardaman
13. Sen. Giles Ward
14. Ed Wilmesherr

By Telephone:

15. Kenny Downs
16. Guy Mitchell
17. Doug Noble
18. Sandy Sanford
19. Adrian Smith
20. Curtis Smith
21. Ralph Young

Secretary of State Personnel Attending:

22. Delbert Hosemann, Secretary of State
23. Cory Wilson, Chief of Staff
24. Cheryn Baker, Assistant Secretary of State, Policy & Research
25. Doug Jennings, Senior Attorney, Policy & Research
26. Phillips Strickland, Division Coordinator, Policy & Research
27. Steven Corhern, Intern, Policy & Research Division
28. Michael Kelly, Intern, Policy & Research Division